

Supreme Court, U. S.

F I L E D

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IN THE
Supreme Court of the United States

No. 75-212

October Term, 1975

UNITED STATES OF AMERICA,
Petitioner

v.

THOMAS W. DONOVAN,
Et Al.

MEMORANDUM IN OPPOSITION TO GOVERNMENT'S
PETITION FOR A WRIT OF CERTIORARI ON BEHALF
OF DOMINIC RALPH BUZZACCO

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in a telephone Intercept Application of a person, whom the Government knows or has probable cause to believe, is involved in the specified illegal activity and can be expected to be overheard in said interception.

2. Whether, the Government violated the Wiretap Interception Statute as indicated in No. 1 above, suppression of the evidence derived from the intercept is justified.

COUNTER STATEMENT OF FACTS

The Defendant, Dominic Ralph Buzzacco, accepts most of the Government's Statement of Facts as contained in their Petition For a Writ of Certiorari, but contends that The District Court did not rely on dictum in *United States v. Kahn*, 415 U.S. 155, No. 72-1328, decided February 20, 1974, slip opinion Page 9, 94 S. Ct. 977, 982. It, in fact, relied upon the actual holding and body of the decision. This Defendant also contends that it was perfectly clear as a result of the Evidentiary Hearing in The District Court below that the Government knew, or should have known, of the existence of Dominic Ralph Buzzacco, his involvement in the suspected bookmaking operations and the fact that his conversations would have been intercepted in connection with the applied and Intercept Order.

REASONS FOR DENYING THE WRIT

The United States Court of Appeals For The Sixth Circuit first approached the questions presented in this case by reviewing the obligations of the Government as dictated by Title III, 18 U.S.C., Section 2518 relating to the necessity of identifying various individuals and applications for intercept authority when the Government had probable cause of suspecting that said individuals would be intercepted in connection with the violation of the relevant crime being investigated. After establishing a Statutory violation for failure to list said individuals in the proper applications, the Court then considered whether suppression of any evidence obtained in connection with said interception was the proper remedy in connection with that particular issue. The Sixth Circuit ruled unanimously that a violation did occur and suppression was the proper remedy.

This Honorable Court has given proper guidance and has established clear precedent in connection with both

of these issues in its decisions in *United States v. Kahn*, 415 U.S. 155, No. 72-1328, decided February 20, 1974, slip opinion Page 9, 94 S. Ct. 977, 982 and *United States v. Giordano*, 416 U.S. 505, No. 72-1057, decided May 13, 1974, slip opinion, Page 21, 94 S. Ct. 1820. The *Kahn* decision refused to burden the Government with the unnecessary duty of conducting a full scale exhaustive investigation of all individuals who may possibly be intercepted in the course of a wiretapping prior to the Government applying for said wiretap. However, the factual situation in *Kahn* is entirely different from the situation that is presently before this Honorable Court. The District Court below, after a lengthy Evidentiary Hearing, ruled that the Government knew of Dominic Buzzacco's identity and general activities relating to any gambling and bookmaking activities prior to its applying for the relevant Application to Intercept Communications which was made on December 26, 1972. Whereas, even though The Supreme Court ruled that Mrs. Minnie Kahn was not a party required to be named in the particular application involved in that case, it stated very clearly that: —

“... Title III requires the naming of a person in the Application or Interception Order only when the law enforcement authorities have probable cause to believe that the individual is committing the offense for which the wiretap is sought.”

The *Giordano* decision addressed itself to the issue of the proper remedy for a Statutory violation such as was the subject matter of the *Kahn* case, and the case which is presently before the Court, relating to identity. The Supreme Court stated very clearly in *Giordano*, supra that Statutory violations of Title III would result in the suppression of evidence, and suppressing of any evidence obtained as a result of the intercept:

“... But it does not necessarily follow, and we cannot believe, that no statutory infringements whatsoever

are also unlawful interceptions within the meaning of Paragraph (i). The words 'unlawfully intercepted' are themselves not limited to constitutional violations, and we think Congress intended to require suppression whether as failure to satisfy any of these statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."

When the *Kahn*, supra, case is read in conjunction with *Giordano*, it becomes apparent that the Supreme Court has imposed upon the Government the obligation of strict Statutory compliance when dealing with Title III interceptions. Furthermore, the Court declared that "suppression of evidence" would result when the Government failed to meet this obligation. The *Kahn* decision clearly states that if the Government had foreknowledge of Minnie Kahn's identity and probable cause to believe she was engaged in gambling operations, then she should have been listed in the application for the wiretap. A failure to identify her under those circumstances would have resulted in suppression of evidence obtained as a result of the interceptions.

The Government cannot look to The Supreme Court's ruling in the *United States v. Chavez, Et Al*, 416 U.S. 562, No. 72-1319, decided May 13, 1974, 94 S. Ct. 1849, for support of its proposition that a Statutory violation of Title III will not result in suppression of any evidence obtained in connection with the interceptions. In *United States v. Chavez, Et Al*, supra, the Court dealt with a simple ministerial mistake which, in effect, did not constitute the same direct substantive violation of Title III as is involved in this appeal. The Court's logic indicated that the suggested violation did not fit under any of the categories of 18 U.S.C., Section 2518 (10)(a) and therefore any evidence obtained in connection with said wire interceptions would

not be suppressed. The Court stated in *Chavez, Et Al*, supra, that:

"*Giordano* holds that Paragraph (i) does include any single 'failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of these extraordinary investigative devices'."

The Government's failure to include Dominic Buzacco in its application of December 26, 1972 was a direct violation of Title III and would be included in Section 18 U.S.C. 2518 (10)(a) as grounds for suppression of evidence obtained as a result of any communications intercepted. This was more than the mere misidentification of an officer authorizing the wiretap application as was the case in *United States v. Chavez, Et Al*, supra. It is interesting to note that the decision in the *United States v. Chavez, Et Al*, supra, case was split five-four with four of the justices dissenting on the grounds that they felt that even the technical misidentification of the officer who authorized the wiretap should result in the suppression of any evidence obtained as a result thereof.

The suggestion of the Government in its Supplemental Memorandum to the effect that there is now a split in decisions from the Fifth Circuit as opposed to the decisions of the Fourth and Sixth Circuits, does not merit the fact that a true conflict exists. The matter of *United States v. Doolittle, Et Al*, 507 F. 2d 1368, rehearing granted April 7, 1975, argued June 3, 1975 (contained in Supplemental Memorandum For The United States, Appendix B) suggests that some prejudice must be shown before suppression would be permitted in a situation where the identity of an individual was not included in an Application For an Intercept Order. The Fifth Circuit Court of Appeals, in its Opinion (Page 17a, Paragraph No. 7, Supplemental

Memorandum For The United States of America), stated that "The Government contends that its agents had personal knowledge, as opposed to information, to support probable cause as to illegal activity *only* [emphasis added] of Doolittle as the co-owner of The Sportsmen's Club, the establishment wherein the telephones were located and to which the telephone bills were sent". There appears to be a distinct and significant factual differentiation between *Doolittle* and the Defendant, Dominic Buzzacco, matter. This Court has established perfectly clear guidelines in connection with these issues which have been followed without hesitation by two Circuits to date.

CONCLUSION

For the foregoing reasons the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

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